IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 394

FILBEN MANUFACTURING COMPANY, INC., BERNICE M. FILBEN, PATRICIA A. FILBEN, ROSEMARY H. FILBEN, DELORES C. FILBEN, and BERNICE M. FILBEN, as Guardian of Patricia A. Filben, Rosemary H. Filben and Delores C. Filben,

Petitioners,

—v—

ROCK-OLA MANUFACTURING CORPORATION OF DELAWARE and ROCK-OLA MANUFACTURING CORPORATION OF ILLINOIS,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I.

In the petition for certiorari, we pointed out that the court of appeals had deemed the interpretation and construction of a cross-license agreement under United States letters patent to be controlled by general or federal law, rather than by Minnesota law. Respondent argues that the court of appeals was correct in that determination. Respondent expressly states that (Resp. Br. 5):

> "... the law to be applied to the construction of the Rock-Ola-Filben agreement in that respect is general or Federal law, and not a matter of State law since it is purely a matter of patent license interpretation."

We say that a license agreement is a contract like any other, and that the court of appeals and respondent are in error in concluding otherwise. The decision of the court of appeals is in conflict with the decisions of this Court in *Erie Railroad Co. v. Tompkins*, and in the other cases enumerated in our petition. (Pet. 6–8.) For this reason alone the writ should issue.

The respondent relies on *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942) and *MacGregor v. Westinghouse Electric & Manufacturing Co.*, 329 U.S. 402 (1947) to support the view of the court of appeals. (Resp. Br. 5.) As the petition for certiorari states, we do not so view these decisions, but in any event, the question presented is of such manifest importance as to impel the issuance of the writ by this Court.

II.

Respondent concedes that petitioners fully presented to the court of appeals the Minnesota law with respect to mistake and reformation, but argues that there was no necessity for the court of appeals to rely on Minnesota decisions, if the federal authorities are "in line" with Minnesota law. Respondent concludes by saying that the federal law "does not differ *fundamentally*" from Minnesota law. (Resp. Br. 5–6.)

The petitioners have a constitutional right to have the court of appeals investigate and apply local law in the decision of non-federal questions. The court of appeals ignored the numerous Minnesota decisions, and relied exclusively upon one irrelevant "general law" decision of its own decided prior to *Erie Railroad Co. v. Tompkins*. The inevitable conclusion is that the court of appeals did not regard Minnesota law as controlling (or in any event did not investigate and apply it) and deprived petitioners of that constitutional right. *Klaxon Company v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941).

III.

Respondent does not deny that the court of appeals independently weighed the conflicting testimony of three witnesses

and set aside the finding of the trial court resting upon the testimony of the witness for petitioners. Instead, it argues that the court of appeals was justified in so doing. (Resp. Br. 14–19.)

Respondent supports the conclusion reached by the court of appeals by arguing that petitioners' witness was an interested person and that little weight should have been given to his testimony. (Resp. Br. 15.) Respondent also argues the weight and effect to be given the testimony of respondent's witnesses, Messrs. Rock-Ola and Davis.[1] These are arguments which were properly addressed to the district court, but which have no validity in a reviewing court. We deny that under Rule 52(a) the court of appeals has any power to set aside a finding of the district court resting exclusively upon conflicting oral testimony by witnesses whom the district court had an opportunity to observe. Under such circumstances, no reviewing court can state from a written record that the finding of the trial court is "clearly erroneous" as required by the Rule. Nowhere has the foundation for the Rule been better stated than in *United States v. Aluminum Co. of America*, 148 F. (2d) 416 (C.C.A. 2d, 1945) where the court of appeals, speaking through Judge Learned Hand said (at 433):

> "However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must

---

[1] Respondent did not point out what is perfectly obvious in any event—that Mr. Rock-Ola, who is president of the respondent, which bears his name, and that Mr. Davis, the attorney who represented respondent in the negotiations with Filben, were also interested persons. Negotiations are not customarily conducted by persons without an interest in the subject matter. And interest frequently arises merely from the fact of having conducted negotiations. But, in any event, the weight to be given to the bias of witnesses is for the trial court and not for the court of appeals or this Court.

be treated as unassailable.' *Davis v. Schwartz*, 155 U.S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289; *Adamson v. Gilliland*, 242 U.S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 477, 58 S. Ct. 300, 82 L. Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds."

Moreover, the respondent continually stresses the asserted fact that the Supreme Court of Minnesota frequently reviews the facts in mistake and reformation cases. We are contending for the application of the substantive law of Minnesota to the interpretation of the license agreement and to the doctrine of mistake and reformation. But the procedural question of what effect should be given to findings of a federal district court is plainly governed not by Minnesota law, but by Rule 52(a).

For the reasons set forth in the petition for writ of certiorari, as well as those set forth above, the writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be allowed.

Respectfully submitted,

MAX SWIREN
BEN W. HEINEMAN
HUBERT H. NEXON,
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Attorneys for Petitioners

JOHN J. MCKASY
600 Midland Bank Building
Minneapolis, Minnesota
Of Counsel